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Articles

Diversity on the Bench and the Quest for Justice for All

BY THERESA M. BEINER*

I. INTRODUCTION

A topic of great interest to many Americans today is judicial selection and diversity on the federal bench. We often hear politicians blaming the federal courts for all sorts of inappropriate decisions and “law making.”¹ In addition, the recent appointment of two Supreme Court Justices has focused more public attention on who sits on the federal bench. Finally, much public discussion has involved the rancor in the nomination process for federal judicial appointees. Thus, this issue has been in the public forefront for quite some time now.² This essay seeks to address one aspect of judicial appointments: the quest for a diverse bench and what that might mean for justice in this country with respect to the civil rights of women and members of minority groups, as well as the ability to work in environments that are free from demeaning behaviors that are directed at workers because of their gender, race, or ethnicity. This essay will also discuss the criminal justice system,

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1. See, e.g., Paul Gewirtz & Chad Golder, *So Who Are the Activists?*, N.Y. TIMES, July 6, 2005, at A19; Kermit Roosevelt, *Time to Abandon Judicial “Activism,”* ALBANY TIMES UNION, Oct. 5, 2006, at A13; Allan D. Sobel, *Executive Director’s Report: Political Assault on the Judicial System*, 88 JUDICATURE 197 (2005).

2. See, e.g., *Glum Democrats Can’t See Halting Bush on Courts*, N.Y. TIMES, Jan. 15, 2006, at 11.

something that people ought to be paying attention to in the judicial appointments process. In some ways, the appointments process is failing to achieve the diversity many people had hoped for, in spite of the appointment of record numbers of women and members of minority groups.³

As lawyers or future lawyers, members of law school communities should be interested in federal judicial appointments. Judicial appointments are not only important when it comes to big issues, like whether *Roe v. Wade*⁴ will be overturned, but in everyday cases as well, such as employment discrimination cases.

My interest in employment discrimination law led me to study judicial appointments. My main scholarly focus has been sexual harassment law. As I read cases in this area in preparation for various articles and classes, I became concerned by what I was seeing in judicial opinions. I read case after case involving what appeared to me to be significant acts of sexual harassment, women being grabbed, pinched, rudely and obnoxiously teased. Yet, the judges decided that the harassment was not sufficiently severe or pervasive to be actionable harassment as a matter of law.⁵ I began to wonder: who were these judges? What were their backgrounds? How could their view of what is or is not actionable sexual harassment be so different from my own?

This led me to the work of political scientists, who for many years had been studying, and continue to study, the voting behavior of judges based on a variety of background characteristics.⁶ Mostly, their work looked at the relationship between the appointing president's political affiliation and judges' voting records. They sought to determine whether, for example, judges appointed by Democratic presidents voted more liberally than those appointed by Republican presidents.⁷ It probably would not surprise many that these sorts of intuitions tended to hold true. That is, judges appointed by Democratic presidents tend to vote more liberally than their Republican appointed counterparts, although it does vary from presidential administration to

3. See Elliot E. Slotnick, *A Historical Perspective on Federal Judicial Selection*, 86 JUDICATURE 13, 15 (2002) ("When Jimmy Carter took office, six women had been appointed to lifetime federal judgeships in our nation's history — Carter appointed 40 in four years. Similarly, while 33 ethnic minorities — blacks, Hispanics, and Asians — had been appointed prior to the Carter administration in the nation's history, 55 were seated during Jimmy Carter's four-year tenure."). See also Rorie L. Spill and Kathleen A. Bratton, *Clinton and Diversification of the Federal Judiciary*, 84 JUDICATURE 256, 258 (2001) (noting that President Clinton appointed 108 women, 61 African-Americans, 25 Latinos, 5 Asian-Americans, and 1 Native American to the federal bench).

4. 410 U.S. 113 (1973).

5. See, e.g., *Saxton v. AT&T, Co.*, 10 F.3d 526, 528, 534-35 (7th Cir. 1993).

6. See Theresa M. Beiner, *The Elusive (But Worthwhile) Quest for a Diverse Bench in the New Millennium*, 36 U.C.DAVIS L.REV 603 (2003).

7. See generally, JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

administration.⁸ For example, studies have shown that President Carter's appointees tend to vote more liberally than President Clinton's appointees, but President Clinton's appointees tend to vote more liberally, at least in some areas, than judges appointed by recent Republican presidents.⁹ With increasing numbers of women and members of minority groups, who political scientists call collectively "nontraditional" appointees (a term that will be used throughout this essay), political scientists began to study other factors that might affect a judge's decision making.¹⁰

With this background in mind, this article will address two subjects. First, it will describe some political science research that suggests why judicial appointments are so important. Second, it will consider what is meant by a truly diverse bench, and how reaching that goal might affect outcomes of cases. At that point, the article will offer a critique of the current system whereby the bench appears to be replicated without as much diversity as one might hope. The article will end with a discussion of a clip from the television show *The West Wing*, which provides an interesting example of what diversity of perspective might mean.

II. WHAT DOES THE DATA FROM POLITICAL SCIENTISTS SUGGEST ABOUT DIVERSITY ON THE BENCH?

In researching this issue, political scientists were eager to see if gender and race would have an effect on voting habits of judges.¹¹ Many legal and political science scholars theorized that the appointment of women and members of minority groups would have an effect on case outcomes.¹² For a

8. Daniel R. Pinello, *Linking Party to Judicial Ideology in American Courts: A Meta-Analysis*, 20 JUST. SYS. J. 219, 240 (1999).

9. See Robert A. Carp, Kenneth L. Manning & Ronald Sudham, *President Clinton's District Judges: "Extreme Liberals" or Just Plain Moderates?*, 84 JUDICATURE 282, 285 tbl. 1 (2001). See Nancy Scherer, *Are Clinton's Judges "Old" Democrats or "New" Democrats?*, 84 JUDICATURE 150, 154 (2000).

10. See Slotnick, *supra* note 3, at 14.

11. See Beiner, *supra* note 6, at 601-02.

12. See, e.g., Sherrilyn A. Ifill, *Racial Diversity on the Bench: Beyond Role Models and Public Confidence*, 57 WASH. & LEE L. REV. 405, 412-13 (2000); Michael E. Solimine & Susan E. Wheatley, *Rethinking Feminist Judging*, 70 IND L.J. 891, 896-97 (1995); Carol E. Garner, *Judges' Gendered Voices: An Empirical Study of Decision Making by the Women of the U.S. Courts of Appeals for the Ninth Circuit*, Case Western Reserve U. School of Law (1994); Nancy E. Crowe, *The Effects of Judges' Sex and Race on Judicial Decision Making on the United States Courts of Appeals, 1981-1996* (dissertation, Dept. of Political Science, University of Chicago 1999); Donald R. Songer & Kelley A. Crews-Meyer, *Does Judge Gender Matter? Decision Making in State Supreme Courts*, 81 SOC. SCI. Q. 750 (2000); Darrell Steffensmeier & Chris Herbert, *Women and Men Policymakers: Does the Judge's Gender Affect the Sentencing of Criminal Defendants?*, 77 SOC. FORCES 1163 (1999); Phyllis Coontz, *Gender and Judicial Decisions: Do Female Judges Decide Cases Differently Than Male Judges?*, 18 GENDER ISSUES 59, 67-72 (2000).

long period of time, any effects based on the gender and race of judge were impossible to determine because there simply was too small a pool, in other words, too few judges, to be able to study a sample that would yield statistically significant results. Once there were a sufficient number of women and African American judges to study, essentially after the Carter Administration,¹³ initial studies showed mixed results on whether the race or gender of the judge had an effect on case outcomes.¹⁴ Some studies showed no effect,¹⁵ some showed effects,¹⁶ and others, particularly those considering the sex of the judge, showed an opposite effect, with women voting more conservatively than their male counterparts.¹⁷ It became very difficult to make generalizations about the effect of race and gender on case outcomes. However, there are at least some areas in which an effect based on race or gender of the judge has been found.¹⁸ The studies that this article will focus on, at least preliminarily, are in a very important one—civil rights, particularly sex and race discrimination cases.

A fairly comprehensive study by political scientist Nancy Crowe suggests that the race and gender of a judge do have an effect on the outcome of race and sex discrimination cases.¹⁹ Crowe studied cases coming through the federal courts of appeals from 1981 to 1996.²⁰ Her study considered only nonconsensual cases, in other words, cases in which there was a dissenter or a reversal by the appellate panel.²¹ Over 90% of court of appeals cases are decided by unanimous 3-0 opinions.²² Instead, Crowe's focus was on a very important subset of sex and race discrimination cases.²³ This subset is important because these cases have areas where disagreements may occur, where the perspectives of the judges are most likely to play a role. Thus, for purposes of studying whether judges of different races and female judges bring a different perspective to the bench, it makes sense to focus on these cases.

13. See Slotnick, *supra* note 3, at 15.

14. See Crowe, *supra* note 12; see also Susan B. Haire, Martha Ann Humphries & Donald R. Songer, *The Voting Behavior of Clinton's Courts of Appeals Appointees*, 84 JUDICATURE 274 (2001); Jennifer A. Segal, *Representative Decision Making on the Federal Bench: Clinton's District Court Appointees*, 53 POL. RES. Q. 137, 142 (2000).

15. See, e.g., Segal, *supra* note 14 at 144-45, tbl. 2; Garner, *supra* note 12, at 25 tbl. 3 & 27 (study of Ninth Circuit found that "Democratic women were not substantially more likely than Democratic men to vote in favor of a discrimination claim.").

16. See, e.g., Crowe, *supra* note 12, at 80, 83, fig. 3.1.

17. See, e.g., Segal, *supra* note 14, at 146 tbl. 3; Crowe, *supra* note 14, at 157.

18. See generally Crowe, *supra* note 12.

19. See *id.*, at 45.

20. See *id.*

21. See *id.*, at 56.

22. *Id.*

23. See Crowe, *supra* note 12 at 45.

The last of Crowe's cases come from 1996, so the Democratic comparison group will be largely Carter appointees, a few Johnson appointees, and those Clinton appointed early in his presidency.²⁴ The full effect of Clinton's appointees are not available in this study, nor are President George W. Bush's appointees considered.

What Crowe found was consistent with intuition, that female judges viewed sex discrimination cases differently than their male counterparts. The study found that Democratic white female judges and Democratic African-American judges were the most likely to cast a vote in favor of a sex discrimination plaintiff, doing so 90% and 93% of the time, respectively.²⁵ Their white male counterparts voted for the plaintiff 76% of the time.²⁶ The results became even more interesting when compared to Republican appointees. Republican appointed white male appellate court judges voted for plaintiffs in sex discrimination cases the least frequently, only 28% of the time.²⁷ White female Republican appointed judges voted for the plaintiff 53% of the time and African American Republican appointed judges voted for the plaintiff 61% of the time.²⁸

When it came to race discrimination cases, political party of the appointing president and race appeared to play a role. Interestingly, gender did not. Thus, African American judges who were appointed by a Republican president voted for the race discrimination plaintiff 60% of the time, whereas those appointed by a Democratic president voted for the plaintiff 85% of the time.²⁹ Democrat-appointed white male and white female judges voted for the race discrimination plaintiffs 49% of the time, and 51% of the time, respectively. Therefore, the gender of a judge was not a statistically significant factor in the decision-making in these cases, although political party of appointing president clearly was.³⁰ Finally, white male and white female Republican-appointed judges were the least likely to vote for a race discrimination plaintiff, casting votes in their favor 20% of the time and 21% of the time, respectively.³¹ Race and political affiliation correlate with the success of plaintiffs in these cases.

Crowe also studied whether the gender composition of the panel correlated with case outcomes and found that the presence of a female judge

24. *See id.* at 56.

25. *Id.* at 83, fig. 3.1.

26. *Id.*

27. *Id.*

28. Crowe, *supra* note 12, at 83, fig. 3.1.

29. *Id.* at 114, fig. 4.1.

30. *Id.*

31. *Id.*

on a panel did not affect the decision making of her male counterparts.³² A more recent study by then law student Jennifer Peresie suggests that gender composition of the panel may affect outcomes.³³ Peresie found that “adding a female judge to the panel more than doubled the probability that a male judge ruled for the plaintiff in sexual harassment cases . . . and nearly tripled this probability in sex discrimination cases. . . .”³⁴ Unlike Crowe, Peresie did not limit her study to nonconsensual cases, but instead included all appellate cases decided in 1999, 2000, and 2001, years in which Clinton’s appointments should be relevant. These cases were gathered using a Westlaw search, which means there are likely unpublished decisions that did not find their way into the study.³⁵ However, as Peresie points out, limiting the search to nonconsensual cases as Crowe did would result in more judges disagreeing. Including within her data set cases in which all the judges agree may allow Peresie to better gauge whether the presence of a female judge has some impact on the outcome.³⁶ Other studies have likewise shown a correlation with the presence of a female jurist and outcomes of cases, although not quite so large as Peresie’s study.³⁷

Crowe’s most recent data from 1996. One could reasonably conclude that perhaps trends have changed with the appointment of judges by President Clinton. Indeed, President Clinton appointed record numbers of nontraditional judges.³⁸ However, Peresie’s numbers suggest that the addition of Clinton judges has not resulted in an overall liberal pro-plaintiff bench in these cases. Like Crowe, Peresie found that gender and political party of appointing president correlated with outcomes. Specifically, male Democrat-appointed judges voted for the plaintiff 30% of the time, whereas their female counterparts voted for the plaintiff 43% of the time.³⁹ Republican-appointed male judges voted for the plaintiff 21% of the time.⁴⁰ Interestingly, Democratic appointed male judges and Republican appointed judges voted

32. *Id.* at 45m 143053 & tbl. 5.

33. Jennifer L. Peresie, Note, *Female Judges Matter: Gender and Collegial Decision making in the Federal Appellate Courts*, 114 *YALE L.J.* 1759 (2005).

34. *Id.* at 1778.

35. *Id.* at 1767 (This is somewhat problematic because some studies suggest that plaintiffs have even less of a chance of winning if cases that are not reported are included in the data set. Peresie included all published and unpublished cases she could access using Westlaw.)

36. *Id.* at 1765; see also Jess A. Velona, *Partisan Imbalances on the U.S. Courts of Appeals*, 89 *JUDICATURE* 25, 26 (2005) (as one source notes, using cases in which a unanimous appellate panel reverses a trial court decision would also reveal ideological differences.)

37. See, e.g., Sean Farhang & Gregory Wawro, *Institutional Dynamics on the U.S. Court of Appeals: Minority Representation Under Panel Decision Making*, 20 *J.L. ECON. & ORG.* 299, 319-20 (Oct. 1994).

38. See Spill & Bratton, *supra* note 3, at 258, 261.

39. Peresie, *supra* note 33, at 1769, tbl. 2.

40. *Id.*

similarly, 30% and 21%, respectively.⁴¹ Further regression analysis found no statistically significant effect for the race of a judge.⁴² Just how this study compares to Crowe's study, which included only nonconsensual cases, is difficult to say. However, it does appear that there is not an overall pro-plaintiff bias. Indeed, Peresie found that plaintiffs lose the vast majority of these cases, nearly 75%.⁴³

Thus, the preliminary findings on Clinton appointees' voting records do not suggest that they are a particularly liberal lot.⁴⁴ And there appears to be little difference in the voting patterns of his traditional and nontraditional judges.⁴⁵ In a study comparing the records of President Clinton's traditional and nontraditional district court appointees, political scientist Jennifer Segal found few differences.⁴⁶ The "only statistically significant race difference exists for personal liberties claims, for which black judges have less support than their white colleagues."⁴⁷ Similarly, there was a gender difference based on the sex of the judge in women's cases, but it was the male Clinton appointees who were more supportive of the women's cases.⁴⁸ Yet, Clinton's female appointees were more supportive of claims involving personal liberties and issues of concern to African Americans (such as race discrimination, voting rights, etc.).⁴⁹ Thus, these judges are not necessarily voting in a manner that suggests, for example, that women are more sympathetic to cases involving women. Interestingly, overall these judges are not going out of their way for "out groups." As Segal explains, "Clinton's judges, regardless of gender, have ruled consistently against the out-group positions in each of these sets of sensitive and controversial issues."⁵⁰ Indeed, in a study of nonconsensual search and seizure cases, Clinton court of appeals appointees voted more like Bush I appointees than Carter appointees.⁵¹ The probabilities of a vote against a criminal defendant in these cases are telling: the likelihood of Clinton's appointees voting against a criminal defendant was 42.07%; the likelihood for Bush I's appointees was 45.76%;⁵² and the likelihood of a Carter

41. *Id.*

42. *Id.* at 1774.

43. *See id.*, at 1768.

44. *See Peresie, supra* note 33, at 1763-64.

45. *See Segal, supra* note 14, at 144-45.

46. *See id.*

47. *Id.* at 144.

48. *See id.* at 145-46.

49. *See id.* at 145.

50. Segal, *supra* note 14, at 145.

51. *See Scherer, supra* note 9, at 154 (study tracking cases decided between Jan. 1, 1994 and June 30, 1998).

52. *Id.*

appointee voting against a criminal defendant was 19.15%.⁵³ So, while Clinton has appointed diverse judges, perhaps these judges are not as diverse in other ways as one might expect, and in ways that may affect their judging habits.

III. WHAT DOES IT MEAN TO HAVE A DIVERSE BENCH?

This leads to the questions of what is meant by a diverse bench and whether that diversity is being achieved through the current appointments process. Part of the thesis of this essay is that diversity may encompass many statuses and backgrounds. What looks like racial and gender diversity in the appointment process might not result in as much diversity in outlook and thinking as one might expect. It is insufficient to appoint women and people of color in a token manner so that the president appointing them looks good to certain constituents. But this, I recognize, presupposes a certain purpose in appointing a diverse bench, a purpose with which not all those who weigh in on the judicial appointment process might agree.

Of course, this article has focused on a particular type of diversity, specifically gender and racial diversity. However, this may be like putting the cart before the horse. Before deciding what factors should play a role in determining the nature of a diverse bench, one should ask what one is trying to accomplish in appointing increasing numbers of women and people of color, or by diversifying in some other sense, such as socio-economic status or career track.

Political scientists have identified two possible reasons for a diverse bench.⁵⁴ First, the purpose behind a diverse bench may be symbolic representation.⁵⁵ This means that diversity provides certain groups with the opportunity to have access to positions of influence so that all members of society will believe in the fairness of the system.⁵⁶ This adds legitimacy to the judiciary by making it mirror the population. The second reason for diversity is what is known as the functional or substantive representation function.⁵⁷ Under this theory, members of under-represented groups will advocate for the interests of the group to which they belong once appointed.⁵⁸ This means that

53. *Id.*

54. See Thomas G. Walker & Deborah J. Barrow, *The Diversification of the Federal Bench: Policy and Process Ramifications*, 47 J. POL. 596, 597 (1985).

55. *See id.*

56. R. William Ide III, *Eradicating Bias in the Justice System*, A.B.A. J., Mar. 1994, at 8; Tony Mauro, *Wider Courtroom Diversity Urged*, USA TODAY, Feb. 25, 1999, at 3A; *see generally* Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent "Yes,"* 61 J. POL. 628 (1999) (describing four different contexts in which a diverse bench is needed).

57. *See* Mansbridge, *supra* note 56; Elaine Martin, *The Representative Role of Women Judges*, 77 JUDICATURE 166 (1993).

58. *See* Mansbridge, *supra* note 56; Martin, *supra* note 57, at 166.

judges of differing backgrounds will bring differing perspectives to the bench based on their own life experience, which could potentially lead to different results, or at least the advocating of different results in lawsuits.⁵⁹ Let me note that I am aware that post-modern legal theorists would call functional representation an essentialist theory.⁶⁰ The very idea that, for example, women will vote a certain way in “women’s cases” is essentialist. It assumes a commonality of perspective among women that is likely unjustified. Indeed, the diversity of perspectives among women may well explain the many studies that show no differences in judging based on gender. While the Crowe and Peresie studies support the idea that female judges are more sympathetic to sex discrimination plaintiffs, bear in mind that the vast number of court of appeals cases are decided by unanimous opinion upholding the trial court. The Crowe study may emphasize Carter appointees, a fairly liberal set of judges.⁶¹ Much of the time male and female judges and Democratic and Republican judges agree.⁶² Putting essentialism aside, there is benefit for the courts when judges bring differing perspectives to a case that reflect the varying experiences of Americans. It is possible to acknowledge this while also being aware that there are a multitude of perspectives among women and African-Americans.

Indeed, members of the United States Supreme Court themselves have recognized that Justice Thurgood Marshall brought such a perspective, advocating for minority groups with members of the Court.⁶³ As Justice O’Connor explained when discussing Justice Marshall:

Although all of us come to the Court with our own personal histories and experiences, Justice Marshall brought a special perspective. His was the eye of a lawyer who saw the deepest wounds in the social fabric and used law to help heal them. His was the ear of a counselor who understood the vulnerabilities of the accused and established safeguards for their protection. His was the mouth of a man who knew the anguish of the silenced and gave them a voice. At oral arguments and conference meetings, in opinions and dissents, Justice Marshall imparted not only his legal acumen but also his life experiences, constantly pushing and prodding us to respond not only to the

59. See Ifill, *supra* note 12, at 412-13; see also Solimine & Wheatley, *supra* note 12, at 896-97.

60. See Ifill, *supra* note 12, at 414; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585-89 (1990); Trina Jones, *The Diversity Rationale: A Problematic Solution*, 1 STAN. J. CIV. RTS. & CIV. LIBERTIES 171, 188 (2005); Sheila Foster, *Difference and Equality: A Critical Assessment of the Concept of “Diversity,”* 1993 WIS. L. REV. 105, 124 (1993).

61. See Crowe, *supra* note 12.

62. See *id.*

63. Sandra Day O’Connor, *Thurgood Marshall: The Influence of a Raconteur*, 44 STAN. L. REV. 1217 (1992).

persuasiveness of legal argument but also to the power of moral truth.⁶⁴

Justice O'Connor's experiences no doubt affected her judging. Her inability to find a job as a lawyer after her graduation from Stanford Law School, only being offered a job as a legal secretary, no doubt made sex discrimination in employment very real to her.⁶⁵ This is not to say that the so-called "traditional" judges, white males, cannot attain this perspective; however, it just may be easier for those with direct experiences in different communities to understand the perspectives of those communities.

One would expect such a diversity of perspectives among President Clinton's appointees, an extremely diverse group. President Clinton, as noted earlier, appointed record numbers of women and people of color.⁶⁶ Yet studies to date do not appear to support a more liberal trend in voting by his nontraditional appointees vis-à-vis his traditional appointees.⁶⁷ President Clinton's appointees vote more like Republican-appointed judges than those of, for example, President Carter in some areas.⁶⁸ Similarly, President George W. Bush has appointed high numbers of nontraditional judges. The only groups that saw an increase, however, were women and Hispanic Americans, at least during his first term.⁶⁹ Like Clinton's nontraditional appointees, a

64. See *id.* at 1217.

65. See *id.* at 1218.

66. See Carl Tobias, *Choosing Federal Judges in the Second Clinton Administration*, 24 HASTINGS CONST. L.Q. 741, 746 (1997); see also Sheldon Goldman & Elliot Slotnick, *Clinton's First Term Judiciary: Many Bridges to Cross*, 80 JUDICATURE 254, 262 (noting that only 47.3% of Clinton's appointees were white males).

67. See Carp et al., *supra* note 9, at 286-87, tbl.4 (revealing that in civil rights and liberties cases as well as labor and economic regulation cases, President Clinton's traditional appointees were actually more liberal than his nontraditional appointees); see also Haire, *supra* note 14, at 277 (characterizing President Clinton's appointees as moderates when compared to judges appointed by other Democratic and Republican presidents); Scherer, *supra* note 9, at 154 (explaining that President Clinton's courts of appeals appointees are not more liberal than President George H. W. Bush's appointees in search and seizure cases); Segal, *supra* note 14, at 147-48 (recognizing President Clinton's nominees as noncontroversial and politically moderate).

68. See Robert A. Carp, Kenneth L. Manning & Ronald Stidham, *The Decision making Behavior of George W. Bush's Judicial Appointees: Far Right, Conservative, or Moderate?*, 88 JUDICATURE 20, 26-27, tbls. 1 & 2 (2004). This study of published district court decisions showed that Clinton appointees made liberal decisions in 42.1% of the civil liberties and rights cases studied, whereas Carter appointees made liberal decisions in 51.3% of those cases. See *id.* at 26 tbl. 1. Comparing this to Republican presidents, Ford's judges made liberal decisions 40.3% of the time in civil rights and liberties cases. Clinton's appointees made more liberal decisions in the criminal justice cases studied than the appointees of other presidents. See *id.* However, other studies suggest different effects for Clinton's court of appeals appointees. See, e.g., Scherer, *supra* note 9. Overall, the Carp et al. study showed Clinton appointees voting more like Ford appointees than, for example, Carter appointees. Carp et al., *supra*, at 26 tbl. 1.

69. See Sara Schiavoni, *Diversity on the Bench*, 88 JUDICATURE 258 (2005).

preliminary study suggests that Bush's nontraditional appointees are not voting all that differently from their white male counterparts.⁷⁰

This leads one to ask what other factors, aside from gender and race, may play a role in influencing decision making. Looking at where both Presidents Clinton and W. Bush have drawn their nontraditional appointees leads to an increasing concern about the common career track of even nontraditional judges and what this means for diversity of perspective.⁷¹ Not only should diversity mean that the perspective of groups that are not traditionally found in the judiciary should find some voice from the bench, but diversity in legal experience and socioeconomic background should help stop the legal system from being slanted too much in one direction. Given the current makeup of the bench and the backgrounds of sitting judges, there is some cause for concern on this point.

The career tracks and socioeconomic statuses of even nontraditional appointees look strikingly similar and should be of some concern if a diversity of perspectives on the bench strengthens the perceived and actual fairness of the justice system. Using President George W. Bush's first term appointees as examples, it is clear he drew nontraditional appointees principally from two pools: ex-judges, or currently sitting judges, and ex-prosecutors.⁷² Thus, 49.1% of President Bush's first term non-traditional federal district court appointees had prosecutorial experience.⁷³ In addition, 74.6% of them had judicial experience.⁷⁴ Only 12.7% had neither judicial nor prosecutorial experience.⁷⁵ While it may make sense to have those with experience as judges sitting on the federal bench, why does this appear to be almost required of nontraditional appointees? Is this so the President's advisors can check earlier opinions of these judges so that they can ascertain whether they pass some ideological litmus test? This is most striking when compared to President Bush's traditional appointees. Only 47.8% of President Bush's traditional appointees had judicial experience.⁷⁶ Indeed, 30.1% of his traditional appointees had no judicial or prosecutorial experience at all.⁷⁷ Are women and

70. See Carp et al., *supra* note 68, at Decision making 27-28 (finding that 34.7% of Bush's traditional appointees and 38% of his nontraditional appointees voted in the liberal direction, a result that the authors are "cautious" about because the "differences are substantively not very great nor are they at levels of statistical significance that would allow us to have more confidence in the findings").

71. Sheldon Goldman, Elliot Slotnick, Gerard Gryski, & Sarah Schiavoni, *W. Bush Remaking the Judiciary: Like Father Like Son?*, 86 JUDICATURE 282, 306 tbl. 3 (2003).

72. *Id.* at 267 tbl. 1.

73. *Id.*

74. *Id.*

75. *Id.*

76. Goldman, et al., *supra* note 71, at 267 tbl. 1.

77. *Id.* at 267 tbl. 2.

members of minority groups only palatable as federal judges if they have a track record as a judge or prosecutor?

Overall, 56.6% of President George W. Bush's district court appointees had judicial experience and 44% had prosecutorial experience.⁷⁸ In addition, 24.4% had experience as neither a prosecutor nor a judge.⁷⁹ Comparing this to the Carter Administration, only 38.1% of President Carter's district court appointees had prosecutorial experience and 31.2% had neither prosecutorial nor judicial experience.⁸⁰ Nearly one-third of President Carter's appointees were coming from a legal sector other than the judiciary or the prosecutor's office.⁸¹ Might that explain their more pro-defendant decision making in search and seizure cases?

Indeed, there is reason to be concerned about the number of prosecutors who are sitting on the bench. While it is difficult to know how many of these ex-prosecutors did some defense work at some point in their careers, it is notable that the political scientists who track this information have no category for ex-public defenders.⁸² One could reasonably be concerned that there is just one perspective, that of the prosecution, being expressed from the bench. Cognitive psychology suggests that this is quite possible.⁸³ Law Professor Deborah Rhode asserts that lawyers who argue one position consistently may adopt that position as their own.⁸⁴ The one-two combination of cognitive conservatism, whereby people naturally retain information that is compatible with their beliefs, and cognitive dissonance, whereby people ignore information that is incompatible with their beliefs, may play a role here.⁸⁵ The end result is that lawyers who advocate a particular side tend to believe that that side is "right." They will ignore evidence and arguments to the contrary and emphasize evidence and arguments consistent with their beliefs. Peresie's study of sexual harassment and sex discrimination cases in the courts of appeal supports this theory. She found no statistically significant differences in voting in these cases based on prior job experience of the judge except that women who previously worked in private practice were more likely to vote for sex discrimination plaintiffs.⁸⁶ A recent study of political bias supports this view.

78. *Id.*

79. *Id.*

80. *Id.*

81. Goldman, et al., *supra* note 71, at 267 tbl. 2.

82. *Id.*

83. See Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 685-86 (1994).

84. *See id.*

85. *See id.*; see also Peresie, *supra* note 33, at 1774 (finding little statistically significant effect based on prior job experience in sexual harassment and sex discrimination cases).

86. Peresie, *supra* note 33, at 1774 (notes that this one area of statistically significant results might be "an artifact of the data" as it had no statistically significant effect on male judges).

Researchers found that Democrats and Republicans are both adept at ignoring facts that threatened their preferred candidates.⁸⁷ One can see how there may be problems with a federal bench populated by prosecutors. A collective prosecution bias is not out of the question. Indeed, cognitive psychology would suggest that even those who at one time might have been sympathetic to the defense would shift after years of practice as a prosecutor.⁸⁸

The wealth of those sitting on the federal bench is another issue often overlooked. While former Chief Justice Rehnquist often complained about the low salaries of federal judges making it difficult for many people to “afford” to be a federal judge, this argument only rings true if federal judges are being plucked from high-paying law firm jobs.⁸⁹ One would imagine, for example, that the salary of a federal judge would be higher than that of a public interest lawyer or a public defender. So just how wealthy are federal judges?

Looking at President George W. Bush’s appointees once again reveals that he has appointed record numbers of millionaires,⁹⁰ with a whopping 53.8% of his first term district court appointees worth more than one million dollars.⁹¹ When it comes to President Bush’s first term court of appeals appointees, over 50% of them were millionaires and none of his traditional appointees to the courts of appeals was worth less than \$200,000.00.⁹² Overall, only 6.2% of his court of appeals appointees (one non-traditional appointee) were worth less than \$200,000.00.⁹³

Yet, President Bush has also appointed a very diverse bench based on gender and race. He has appointed more nontraditional judges than any other Republican president with 20.5% of his district court appointees being female, and 14.5% of his district court appointees being people of color, mostly Hispanic at 7.2%.⁹⁴ Yet, given their wealth and common career paths, maybe they are not as diverse as one might expect.

So maybe the increasingly “diverse” bench is not so diverse as expected. In her critique of liberal feminism, the branch of feminism that seeks equality with men, Catharine MacKinnon explained:

87. *Democrats and Republicans Both Adept at Ignoring Facts, Study Finds*, LIVE SCIENCE, available at http://www.livescience.com/othernews/060124_political_decisions.html (last visited Apr. 1, 2007).

88. See Rhode, *supra* note 83, at 685-86.

89. See Michael J. Frank, *Judge Not, Lest Yee be Judged Unworthy of a Pay Raise: An Examination of the Federal Judiciary Salary “Crisis,”* 87 MARQ. L. REV. 55 (2003) (describing the views of Chief Justice Rehnquist on federal judicial salaries).

90. See Goldman, *supra* note 71, at 309 tbl. 1.

91. See *id.*

92. See *id.* tbl. 3.

93. See *id.*

94. See *id.* tbl. 4.

The women that gender neutrality benefits, and there are some, show the suppositions of this approach in highest relief. They are mostly women who have been able to construct a biography that somewhat approximates the male norm, at least on paper. They are the qualified, the least of sex discrimination's victims. When they are denied a man's chance, it looks the most like sex bias. The more unequal society gets, the fewer such women are permitted to exist. Therefore, the more unequal society gets, the *less* likely the difference doctrine is to be able to do anything about it, because unequal power creates both the appearance and the reality of sex differences along the same lines as it creates its sex inequalities.⁹⁵

Is this what is happening on the federal bench? Are there certain career tracks and backgrounds that make women and people of color "safe" appointments and make them look more like their white male counterparts?

Federal judicial appointments should be viewed critically on a number of bases, lest the federal courts will become populated by judges who reflect very similar viewpoints. As a result the bench will lose the richness of debate and outcomes that come from diverse perspectives. I have asked myself as I observed the rancor in the current process if it would be possible to appoint a Thurgood Marshall anymore. Is appointment of public interest lawyers, a category not accounted for by political scientists, out of the question? This article ends with an ideal vision of what diversity of perspectives might mean.

On an episode of *The West Wing* called "The Supremes,"⁹⁶ the Bartlett Administration considered appointment of a new Supreme Court justice. In this episode, Justice Brady, a smart, young ultra-conservative associate justice (think Scalia ten years ago) has unexpectedly died. The Democratic Bartlett Administration is scrambling to find a replacement, but realizes Republican senators will never agree to the left leaning liberal they would prefer to appoint. So, they set out looking for a palatable centrist. Along the way, to appease more liberal constituents, they invite Judge Evelyn Lang, played by Glenn Close, to interview for the slot. Judge Lang is considered a very liberal court of appeals judge who has struck parental consent laws and believes Congress' commerce clause power is broader than the United States Supreme Court's decision in *Lopez*. She's smart and politically savvy. Josh Lyman, the staffer who interviews her "loves her." Enter the centrist candidate, Bradley Shelton, played by Robert Picado. Shelton is the ultimate middle-of-the-road

95. CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 37-38 (1987).

96. *West Wing: The Supremes* (NBC television broadcast, Mar. 24, 2004) (episode summary available at http://www.nbc.com/The_West_Wing/episode_guide/109.html (last visited Jan. 19, 2005)).

judge, who will not commit to anything but his devotion to the “eccentricities” of the case. When he responds to a question from President Bartlett about his position on affirmative action, he has no position. As you might expect, this is not the best response for the liberal Bartlett Administration.

What to do? Presidential aide Josh Lyman hatches a plan. Why not ask the far left (think William Brennan or—better yet—Earl Warren) Chief Justice Ashland to retire. The Bartlett administration could then appoint Judge Lang to his position, thereby appointing the first female Chief Justice to the court, while maintaining that seat for a far left liberal. In exchange, Republicans could pick the judge of their choice to fill the seat left vacant by the now deceased Justice Bradley. While other aides think this unlikely to work, Josh is sent to a key Republican aide to the Senate Judiciary Committee to see who the Republicans would propose for the Associate Justice slot. They demand the appointment of Circuit Judge Christopher Mulriti, who is young and extremely conservative. As Toby Ziegler, another presidential aide notes, he’s a judge who doesn’t believe in a right to privacy or that there should be separation of church and state. He is, from the administration’s point of view, totally unacceptable. At least, they think so. The Administration changes its mind after Josh Lyman witnesses a discussion about constitutional law between Judges Mulriti and Lang. Josh is a firsthand witness to the richness that difference and diversity of perspectives can have on legal argumentation and, potentially, the decision making process. This leads him to cut a deal with the Republican Senators whereby both judges—with widely differing viewpoints—will both get seats on the Court. While this is only a fictional account, its point is well-taken. What would happen if there were truly a diversity of perspective on the federal bench? At this point, all one can do is wonder.